

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
SEVENTH REGION**

**LAKEPOINTE SENIOR CARE
AND REHAB, LLC¹**

Employer

and

CASE 7-RC-22861

**LOCAL 79, SERVICE EMPLOYEES
INTERNATIONAL UNION, AFL-CIO²**

Petitioner

APPEARANCES:

Karen Bernard Berkery, Attorney, of Detroit, Michigan, for the Employer.
Clifford Hammond, Attorney, of Detroit, Michigan, for the Petitioner.

DECISION AND ORDER

Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, a hearing was held before a hearing officer of the National Labor Relations Board.

Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated its authority in this proceeding to the undersigned.

Upon the entire record³ in this proceeding, the undersigned finds:

1. The hearing officer's rulings are free from prejudicial error and are hereby affirmed.
2. The Employer is engaged in commerce within the meaning of the Act, and it will effectuate the purposes of the Act to assert jurisdiction herein.

¹ The name of the Employer appears as amended at the hearing.

² The name of the Petitioner appears as amended at the hearing.

³ The Employer and Petitioner filed briefs, which were carefully considered.

3. The labor organization involved claims to represent certain employees of the Employer.

4. No question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.

Introduction

The Petitioner seeks to represent a unit of approximately 19 full-time and regular part-time licensed practical nurses (LPNs) employed by the Employer at its nursing home facility located in Clinton Township, Michigan. The Employer contends that the petitioned-for unit is inappropriate inasmuch as the LPNs, who are designated by the Employer as charge nurses, are supervisors within the meaning of Section 2(11) of the Act. The Employer alternatively asserts that the LPNs who serve as afternoon and midnight shift charge nurses should be excluded from the unit as statutory supervisors. Finally, in its brief, the Employer asserts that if any of the LPN charge nurses are found not to be supervisors, the unit must include approximately six registered nurses (RNs), also designated as charge nurses, who perform the same duties as the LPNs and share a community of interest with them. At hearing, the Petitioner contended that none of the petitioned-for nurses are supervisors within the meaning of the Act. However, in its brief, Petitioner modified its position to state that LPN charge nurses are not supervisors with the exception of those on the midnight shift. The Petitioner did not set forth a position on the status of the RNs.

I find that the Employer has satisfied its burden of proof that all the LPN charge nurses are supervisors. I do so based primarily on their authority to discipline and evaluate employees.

Overview

The Employer operates a 201 bed nursing care facility. The single-story facility is divided into 3 wings, A, B, and C. The Employer operates round-the-clock with three shifts. The day shift is from 7:00 a.m. to 3:30 p.m. The afternoon shift is from 3:00 p.m. to 11:30 p.m. The midnight shift is from 10:00 p.m. to 7:00 a.m. In addition, some of the nursing staff works 12-hour shifts from 7:00 a.m. to 7:00 p.m. and 7:00 p.m. to 7:00 a.m.

Administrator Judy Bradford manages the facility. The nursing department is headed by Director of Nursing (DON) Sheryl Amos. The assistant director of nursing (ADON) is Demetria Gross. Nursing management also includes Unit

Coordinators Kevin Adams and Nilo Elizalde; RAI care assistant Judy Bradshaw; intake/dining coordinator Sherman Hayes; and weekend supervisor Patricia Riser.⁴ All of these individuals work day shift hours until about 5:00 p.m.

The nursing department staff consists of 19 LPNs, known as charge nurses, including two midnight shift supervisors; 6 RNs, also known as charge nurses; certified nursing assistants (CENAs); activity aides; restorative aides; and ward clerks. The latter four classifications, along with maintenance employees, are in a bargaining unit represented by the Petitioner. The current collective bargaining agreement for that unit is effective from October 6, 2003 to October 6, 2006.

All charge nurses sign a job description at the time of hire. Pertinent provisions provide that a charge nurse “supervises [CENAs], recommends hiring of CENAs, makes assignments based on the shift’s needs, enforces facility policies, and administers discipline up to and including recommending discharge.” The job description additionally provides that the charge nurse “assists in training and evaluating performance of assigned personnel and disciplines as needed in accordance to facility policy.”

Scheduling, Assignments and Transfers

Staffing levels are dictated by State and Federal regulations and budgetary constraints. During the day shift, there are approximately 3 charge nurses, 13 CENAs, and 1 ward clerk assigned to each wing. During the afternoon shift, there are approximately 3 charge nurses and 9 CENAs assigned to A and B Wings, and 3 charge nurses and 11 CENAs assigned to C Wing. During the midnight shift, there is 1 charge nurse designated as midnight shift supervisor, known as house manager, and 3 CENAs assigned to A Wing, and 1 charge nurse and 4 CENAs assigned to both B and C Wings.

The schedules for charge nurses and CENAs are prepared by scheduler employee Natalie Murphy⁵. These schedules include shift and wing assignments. The charge nurses and CENAs often remain assigned to the same wing. The CENAs place a written request to scheduler Murphy regarding approval for schedule changes, time off, and vacations. A 30-minute lunch and two 15-minute breaks for the CENAs are designated by their collective bargaining agreement.

⁴ The parties are in agreement, and I find, that the positions of administrator, DON and ADON are supervisory and managerial positions and are excluded from the petitioned-for unit. The parties stipulated, and I find, that Adams, Elizalde, Bradshaw, Hayes, and Riser are supervisors within the meaning of the Act because they have the authority to hire, fire, and discipline employees.

⁵ The record does not indicate whether Murphy is an LPN, or the parties' positions as to her inclusion in the unit.

While the record indicates that the CENAs are required to sign out for breaks and lunch, it is silent as to the charge nurses' authority regarding the scheduling of break and lunch times.

The charge nurses complete assignment sheets for their wing and shift once they receive a list of CENAs assigned to the shift. The assignment sheet is pre-printed and the charge nurses complete it by adding the names of the CENAs, the patient rooms they are assigned to, and any reminders for them or extra duties they are to perform in addition to their regular day-to-day duties. A reminder might be to sign out for all breaks. Extra duties might include waking a resident early due to the room being painted or providing an early snack.

The charge nurses do not possess authority to change the assigned shifts of the CENAs. However, based on staff-to-patient ratio requirements, they do possess authority to call in CENAs and/or extend CENA shifts if the shift is understaffed, and send CENAs home if the shift is overstaffed. In calling in CENAs and extending CENA shifts, the charge nurses possess authority to approve CENA overtime. When extending shifts, calling in CENAs or sending CENAs home, the charge nurses follow the CENA seniority list.⁶ The charge nurses also possess authority to transfer CENAs to different wings based on staffing and resident needs.

Patient Care and Directing the Work of CENAs

The duties of the CENAs include basic care of residents and assistance with daily living functions, such as walking, bathing, dressing, feeding, and hygiene. New CENAs are trained in both a classroom setting and on the job. Classroom instruction is provided by an in-service education coordinator. On the job training is by the in-service education coordinator, unit coordinators, charge nurses, and other CENAs.

The charge nurses oversee the work of the CENAs. The work of the CENAs is largely routine and does not require continuous supervision. As noted, CENA wing assignments are predetermined, but can be changed by the charge nurses depending on staffing exigencies. The administrator, DON, ADON, and unit coordinators work during the day shift and there are no supervisors above the charge nurses present during a significant portion of the afternoon shift and the entire midnight shift. All charge nurses have access to the DON by phone, and are expected to call her in the event of an emergency or unusual situation.

⁶ The record indicates that the charge nurses may first ask for volunteers when sending home CENAs.

At the start of each shift, the charge nurse takes reports from the outgoing shift. The CENAs generally start their shift by reviewing the assignment sheet and performing some of their regular day-to-day duties. They eventually meet with the charge nurse regarding updates on the condition of residents and other issues relevant to individual resident care. During the shift, the charge nurses pass medications, perform treatments, complete charting, and follow up on any changes in the condition of residents.

Discipline

The Employer's progressive discipline procedure is set forth in its work rules for all employees. There are three levels of work rule offenses in the progressive discipline procedure. These rules cover a wide variety of employee conduct, including attendance, attitude, appearance and behavior at work, work performance, and timecards. Level three infractions are the most serious and call for the suspension or termination of an employee.

If a charge nurse concludes that a CENA has violated the Employer's work rules, the charge nurse has authority and discretion to (1) do nothing; (2) verbally counsel the employee without issuing any write-up; (3) issue a written verbal counseling on a "counseling form," or (4) issue a written reprimand on an "employee disciplinary warning record." The disciplinary forms are kept at the nurses' station on each wing along with other important forms, such as on-call nurse schedules, corporate, administrative and emergency phone numbers, and resident-related paperwork.

A written reprimand issued on an employee disciplinary warning record subjects the offending employee to the progressive discipline procedure. On the employee disciplinary record, the charge nurse sets forth the offense, both by subject and a narrative of the facts, and decides which of the three levels the offense falls into, with different levels of possible discipline flowing from each.⁷ The work rules set forth the possible discipline for each level of offense and the nurse decides the level of the offense. However, when the discipline to be imposed is a suspension or discharge, it must be approved at a higher managerial level, by the DON or ADON.

The employee disciplinary warning record contains a series of boxes indicating what type of action is being taken. The charge nurse who completes the form checks one of the following boxes: "written verbal"; "1st written warning";

⁷ Level one violations result in penalties ranging from a verbal consultation to discharge. Level two violations provide for penalties ranging from a written warning to discharge. Level three violations call for suspension or discharge for a first offense.

“2nd written warning”; “suspension”; or “subject to discharge/termination”. In order to know which box to check, the charge nurse has to either personally have knowledge of the employee’s disciplinary record or access to the personnel file. Nurses do not have immediate access to personnel files. Thus, they call the human resources office where the files are kept to check the disciplinary history of the offending employee or can gain direct access to the personnel file upon request to the human resources office.

After charge nurses prepare disciplinary write-ups on employee disciplinary warning records, they sign and issue them directly to the CENAs, with a union representative present. A copy is then forwarded by the nurse to the human resources office for placement in the employee's personnel file. As noted, there is no further investigation or additional signatures on the write-up unless the write-up calls for the suspension or discharge of the offending employee.

Evaluations

The charge nurses complete evaluations of probationary CENAs following their 90-day probationary period, and thereafter on an annual basis. The evaluation forms are pre-printed. The charge nurses complete the evaluation form by numerically scoring the CENAs in the areas of quality and quantity of work, dependability, cooperation, initiative, self-improvement, and personality. The numerical scores are grouped into the categories of outstanding, above average, average, below average, and unsatisfactory. The points are added and the evaluated employee receives an overall score resulting in one of these five ratings. The charge nurses may add personal comments regarding identification of new goals, objectives, and commitments. Finally, the charge nurses check either a yes or no box as to whether the evaluated employee is recommended for continued employment. Only the charge nurses and the evaluated employees sign off on the evaluations. There is no review of such evaluations by higher management; rather, they are placed directly into employees' personnel files. In evaluating probationary employees, the charge nurses also possess authority to extend their probationary periods.

The evaluations completed by the charge nurses do not affect CENA wages, which are contractually determined. However, there is evidence that these evaluations impact job transfers and promotions. For example, the Employer recently created a shower team consisting of six CENAs and posted for the position of shower team aide. In deciding among the CENA applicants for these positions, the Employer considered their evaluations as a significant factor.

Secondary indicia

Charge nurses and bargaining unit employees punch a time clock, receive the same employee benefits, and are subject to the same work rules. Most of the LPN charge nurses earn \$22.00 per hour. The six RNs who are charge nurses earn more than the LPNs based exclusively on their higher level of education.⁸ The CENAs earn approximately \$11 to \$12.00 per hour. The charge nurses attend managerial meetings during which staffing, resident, and policy issues are discussed. They are encouraged to participate in these meetings regarding all issues and to make recommendations. The charge nurses all wear badges designating them as either LPN or RN, with the exception of the charge nurse assigned as midnight supervisor whose badge states "midnight supervisor."

Midnight Shift Supervisor

The one charge nurse assigned to A Wing on the midnight shift is designated as midnight shift supervisor or house manager. The position has a separate job description. Janet Mann and David Braswell are the two LPN charge nurses regularly assigned to this position. They work alternating 12-hour shifts from 7:00 p.m. to 7:00 a.m. They are responsible for the entire facility as there are no higher management personnel present during this time. In addition to their charge nurse duties, they regularly handle any staffing issues, such as calling in extra staff or adjusting staff employees throughout the facility. The midnight shift supervisor wears a midnight supervisor badge and earns a shift premium of \$2.50 per hour⁹.

Analysis

Section 2(3) of the Act excludes from the definition of the term "employee" "any individual employed as a supervisor." Section 2(11) of the Act defines a "supervisor" as:

...any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, promote, discharge, assign, reward, or discipline other employees or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

⁸ The specific hourly rate of the RNs is unclear from the record.

⁹ Any charge nurse who acts as a midnight shift supervisor earns the shift premium.

Section 2(11) is to be interpreted in the disjunctive and the possession of any one of the authorities listed in that section places the employee invested with this authority in the supervisory class. *Ohio Power Co. v. NLRB*, 176 F.2d 385 (6th Cir. 1949), cert. denied 338 U.S. 899 (1949); *Allen Services Co.*, 314 NLRB 1060, 1061 (1994). However, the Board is mindful not to deprive employees of their rights under Section 7 by interpreting the term supervisor too broadly. *Unifirst Corp.*, 335 NLRB 706, 712-713 (2001); *Azusa Ranch Market*, 321 NLRB 811, 812 (1996).

In *NLRB v. Kentucky River Community Care*, 532 U.S. 706 (2001), the Supreme Court upheld the Board's longstanding rule that the burden of proving Section 2(11) supervisory status rests with the party asserting it. See *Ohio Masonic Home*, 295 NLRB 390, 393 fn. 7 (1989); *Bowen of Houston, Inc.*, 280 NLRB 1222, 1223 (1986). However, the Court rejected the Board's interpretation of "independent judgment" in Section 2(11)'s test for supervisory status, i.e., that nurses will not be deemed to have used "independent judgment" when they exercise "ordinary professional or technical judgment in directing less-skilled employees to deliver services in accordance with employer-specific standards." 532 U.S. at 707. Although the Court found the Board's interpretation of "independent judgment" in this respect to be inconsistent with the Act, it recognized that it is within the Board's discretion to determine, within reason, what scope or degree of "independent judgment" meets the statutory threshold. See *Beverly Health & Rehabilitation Services*, 335 NLRB 635 fn. 3 (2001). Further, the Court acknowledged that the term "independent judgment" is ambiguous as to the degree of discretion required to establish supervisory status and that such degree of judgment "that might ordinarily be required to conduct a particular task may be reduced below the statutory threshold by detailed orders and regulations issued by the employer." 532 U.S. at 713-714.

In discussing the tension in the Act between the Section 2(11) definition of supervisors and the Section 2(12) definition of professionals, the Court also left open the question of the interpretation of the Section 2(11) supervisory function of "responsible direction," noting the possibility of "distinguishing employees who direct the manner of others' performance of discrete tasks from employees who direct other employees." 532 U.S. at 720. See *Majestic Star Casino*, 335 NLRB 407, 408 (2001). For instance, direction as to a specific and discrete task falls below the supervisory threshold if the use of independent judgment and discretion is circumscribed by the superior's standing order and the employer's operating regulations, which require the individuals to contact a superior when problems or anything unusual occurs. *Dynamic Science, Inc.*, 334 NLRB 391 (2001); *Chevron Shipping Co.*, 317 NLRB 379, 381 (1995).

The supervisory status of the charge nurses in this case turns on their role in staffing decisions, including scheduling approval of overtime, and temporarily moving CENAs to a different wing, their assignment of work to and direction of CENAs, and whether they exercise the authority to discipline because of their involvement in the employee warning and evaluation process.

With respect to scheduling, assignment and direction of CENAs, the master work schedule is centrally formulated. CENA room and job assignments, reassignments, and directions given by the charge nurses are patterned upon the established schedule and practice in a manner that is essentially routine in nature, and does not require the exercise of independent judgment. Specifically, the charge nurses' assignments to CENAs, including temporary details to other wings, are merely reflective of patient census and the exigencies of workload needs, and require no more judgment than garnered by the nurses' experience and training. *Hillhaven Rehabilitation Center*, 325 NLRB 202, 203 (1997); *Illinois Veterans Home at Anna, L.P.*, 323 NLRB 890, 891 (1997). In addition, the evidence presented was insufficient to demonstrate that the direction of the CENAs is "responsible direction" which depends "on whether the alleged supervisor is held fully accountable and responsible for the performance and work product of the employees he directs." *Franklin Home Health Agency*, 337 NLRB 826, 831 (2002), quoting *Schnurmacher Nursing Homes*, 214 F.3d 260, 267 (2d Cir. 2000). As for deciding on the need for overtime by extending CENAs hours or calling in CENAs, such decisions are based on pre-determined staffing rules. They do not involve discretionary exercise of judgment essential to supervisory status. Further, the selection CENAs to work the overtime hours is determined by seniority. See, *Illinois Veterans Home of Anna, L.P.* supra at 891; *Youville Health Care Center, Inc.* 326 NLRB 495, 496 (1998).

As to their role in the disciplinary process, the charge nurses initiate discipline of the CENAs. Exercising independent judgment and discretion, nurses identify conduct that violates employee work rules or is otherwise inappropriate; complete the employee disciplinary warning record, which involves placing the conduct in one of three levels of violations, each one of which has discrete pre-assigned punishment; present the disciplinary form to the offending employee; permit union representation; and transmit the disciplinary form to the human resources office for placement in the employee personnel file. The basis for discipline runs the gamut of rule violations from attendance to patient care related infractions to insubordination.

The Employer utilizes a progressive discipline policy. Thus, the employee disciplinary warning record, if there are repeated violations, plays a role in what could be the eventual suspension or discharge of an employee. The charge nurses

are empowered to use the discipline form to enforce the Employer's entire panoply of work rules, not just those related to patient care. See, *Wedgewood Health Care*, 267 NLRB 525, fn.4 (1983).

The authority of the charge nurses unilaterally to determine employee violations of the work rules, to determine which level of rule violation is involved, and to present the warning notice as part of the progressive system of discipline to the employee, is indicative of supervisory authority, particularly where the warning is placed into the offending employees' personnel files without further investigation or review by higher supervisory authority. *Heartland of Beckley*, 328 NLRB 1056 (1999); *Wedgewood Health Care*, supra at 526. While the employee disciplinary warning records in the record do not reflect independent issuances of discipline beyond written warnings, these are significant because of the Employer's progressive system of discipline. *Heartland of Buckley*, supra.

The charge nurses' evaluation of CENAs is further indication of their supervisory status. The 90-day evaluations of probationary CENAs can result in continued employment as a non-probationary employee or an extended probationary period. See *Wedgewood Health Care*, supra. While the record is silent as to whether any evaluations completed by the charge nurses have resulted in suspension or discharge, the evaluation form directs the charge nurse to recommend whether the evaluated employee should be continued in employment and these evaluations are utilized by the Employer in determining job retention, transfers and promotions. See *Pine Manor Nursing Center*, 270 NLRB 1008, 1009 (1984); *Iron Mountain Forge Co.*, 278 NLRB 255, 259-260 (1986).

Further support for the finding of supervisory status is certain secondary indicia of supervisory status. The existence of secondary indicia, such as title and higher pay, standing alone, are insufficient to demonstrate supervisory status. *Shen Automotive Dealership Group*, 321 NLRB 586, 594 (1996); *Billows Electric Supply*, 311 NLRB 878 fn.2 (1993). However, they can be a factor and here they are significant. The job descriptions of charge nurses note their supervisory authority. *Wedgewood Health Care*, supra at 526, fn.11. For substantial periods after first shift, they are the highest ranking employees in the facility premises. *St. Francis Medical Center-West*, 323 NLRB 1046, 1047-1048 (1997). The charge nurses also are regular participants in managerial meetings. *McClatchy Newspapers, Inc.*, 307 NLRB 773 (1992).

Conclusion

In view of the foregoing, and the record as a whole, I conclude that the charge nurses exercise authority in the interest of the Employer which requires the

use of independent judgment, and that such authority extends to the enforcement of the Employer's major personnel policies, and is not merely an outgrowth of their training or incidental to their patient care responsibilities. *Wedgewood Health Care*, supra at 527. Accordingly, I find that the charge nurses are supervisors within the meaning of Section 2(11) of the Act.¹⁰ Thus, the petitioned-for unit is not appropriate for the purposes of collective bargaining and I shall dismiss the petition.¹¹

ORDER

IT IS ORDERED that the petition is dismissed.¹²

Dated at Detroit, Michigan, this 24th day of May, 2005.

(SEAL)

"/s/[Stephen M. Glasser]."

/s/ Stephen M. Glasser

Stephen M. Glasser, Regional Director
National Labor Relations Board – Region 7
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¹⁰ In view of this finding, and the lack of opportunity to present evidence on the issue, I find it unnecessary to rule on whether RN charge nurses share a sufficient community of interest with LPN charge nurses to warrant their participation in a self-determination election should the LPN charge nurses be found to be employees.

¹¹ If the LPN charge nurses are found to be employees, the Employer and Petitioner agree, and I find, that the midnight shift supervisors, Janet Munn and David Braswell, are supervisors and excluded from the unit.

¹² Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the **Executive Secretary, Franklin Court, 1099 14th Street N.W., Washington D.C. 20570**. This request must be received by the Board in Washington by **June 7, 2005**.